(2)

No. 89-1781

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

Estate of JAMES MANNO and DOMINICK MANNO, doing business as Astorian Manor,

Petitioners,

against

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

DOL # 87077444

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

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Dated: June 26, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(4111)

Counter Statement of Question Presented

Whether the court below properly declined to consider petitioners' claim of denial of due process because the issue had not been raised in the pleadings or at the administrative hearing.

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Counterstatement of the Case

Astorian Manor is a catering hall located in Queens County in the State of New York that has ten rooms which can be and are utilized concurrently for different affairs, especially on weekends. It was conducted as a partnership of James Manno and his brother Dominick Manno until February 28, 1981. James Manno conducted the business as a sole proprietorship from March 1, 1981 through November 30, 1983, the end of the audit period

involved here. He died on May 5, 1984. A field audit of the business had been conducted in 1983 by the Audit Division of the State Department of Taxation and Finance for the period March 1, 1980 through November 30, 1983. That audit determined that sales and use taxes were due from petitioners in the total amount of $111,427 (not including penalties and interest).[1]

Thereafter, an administrative hearing was held at petitioners' request. The evidence revealed that although the total sales as stated in petitioners' books were in close agreement with its Federal tax returns and State sales returns, many affairs listed in its appointment books, which were used to schedule contracted affairs, were not recorded anywhere else in its books and records. After analyzing petitioners' appointment books for a two-year period, the auditors found that 175 affairs were listed in petitioners' appointment books but not anywhere else (App 9a-10a).[2]

The auditors checked on the 175 unrecorded affairs by sending letters or making field visits or making telephone calls to those customers who had contracted for the affairs. Of the 175 affairs, 30 were confirmed by actual contracts sent to the auditors, 25 were verified by oral or written statements and 105 were estimated based upon the appointment book notations because although the individuals contacted did not cooperate, they did not deny that the affairs took place.[3] In 15 cases the Audit Division

[1]The audit had three areas of concern: expense purchases, fixed assets acquisition and sales. Petitioners address in this petition that portion of the audit dealing with sales. A copy of the field audit report, dated September 18, 1984, is annexed to the petition (App 14a-23a).

[2]A copy of the decision of the State Tax Commission, dated June 18, 1987, is also appended to the petition (App 8a-13a).

[3]Malcolm Richard, Esq., petitioners' attorney at the hearing, agreed to the admission of the customers' letters and receipted contracts. They were included in Exhibit "J" which was admitted at page 17 of the hearing transcript. A copy of that page is appended hereto.

received no reply and appointment book notations were not complete. In these cases the prices of the affairs were determined by averaging the sales prices of the other 160 affairs (App 10a-11a).

Since the contents of petitioners' books and records had been shown not to be accurate, the auditors' analysis for the initial two-year period was used to project taxes for the remaining audit period without looking at the appointment books for the additional period (App 11a). In its decision of June 18, 1987, the State Tax Commission concluded that the auditors had properly determined additional sales taxes due from petitioners based upon the examination of available books and records (App 8a, 12a).

Petitioners then commenced a proceeding pursuant to article 78 of the Civil Practice Law and Rules (CPLR) in the State Supreme Court. They alleged that the decision of the State Tax Commission was contrary to law and arbitrary because it was not based upon available records and that it was unsupported by substantial evidence. Petitioners did not allege at the administrative hearing or in the petition any violations of their right to due process of law.[4]

The proceeding was then transferred to the Appellate Division, Third Department, pursuant to New York CPLR 7804(g), because the petition raised a substantial evidence question. Petitioners argued for the first time in the Appellate Division that their right to due process of law had been violated at the administrative hearing (R3a-4a). The court rejected this argument holding that "[a] claim of denial of due process which was not raised in the pleadings or at the administrative hearing, as here,

[4]A copy of the petition is appended hereto.

cannot be raised for the first time in this court * * *" (citations omitted) (App 4a). The court found that petitioners had failed to object at the administrative hearing to the admission of the documents in issue (customers' letters and receipted contracts). As a consequence, it concluded that petitioners' claim of a due process violation had not been preserved for review (App 4a). The court after considering the record of the administrative hearing confirmed the State Tax Commission's decision because it found that it was supported by substantial evidence (App 4a-5a).

Petitioners then moved for leave to appeal to the Court of Appeals on non-constitutional grounds. That motion was denied on September 12, 1989, 74 NY2d 610. Thereafter, petitioners filed a notice of appeal to the Court of Appeals on constitutional grounds pursuant to CPLR 5601(b).[5] On February 22, 1990 the Court of Appeals dismissed that appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved (App 1a). ____ NY2d ____. Petitioners now seek a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

This case raises no constitutional question.

Petitioners contend here that their right to procedural due process was violated because photocopies of receipted

[5]That provision provides in pertinent part for an appeal of right to the Court of Appeals:

> "1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; * * *".

contracts received by the auditors in 1984 were not made available to them until the hearing of December 3, 1986. Petition, p 6. They argue also that their right to substantive due process was violated with respect to the 105 affairs that were estimated based upon appointment book notations where the individuals contacted by the auditors did not cooperate. Petition, p 8. We urge that the writ be denied because the constitutional questions which petitioners attempt to raise here have never been drawn into issue.

It is well settled that this Court has jurisdiction to review a final judgment of a State court "* * * only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb,* 451 US 493, 496-497 (1981); *see, also, Board of Directors of Rotary International v. Rotary Club,* 481 US 537, 550 (1987). Where the State's highest court has failed to pass upon a federal question, it is assumed, unless the petitioners show to the contrary, that the omission was due to want of proper presentation of such issue in the State court. 451 US at 495. Here, the record shows that the State courts did not pass on the questions of federal constitutional law raised here because petitioners failed to preserve those questions for review (App 3a-4a).

Petitioners waited until they were in the State Appellate Division before they claimed for the very first time that they had been denied constitutional rights. They argued that their due process rights had been violated because they had been deprived of an opportunity to see documents relied upon by the auditors prior to the administrative hearing. Petition p 14. However, if petitioners had objected on these grounds at the administrative hearing, the hearing officer, if warranted, could have given peti-

tioners an opportunity to review the documents before continuing with the hearing. This could have resolved the situation of which petitioners now belatedly complain. As a consequence of petitioners' failure to object at the administrative hearing or to raise the issue in the petition, the issue was not preserved for review by the Appellate Division and Court of Appeals. *See, Matter of Leogrande v. State Liquor Authority,* 19 NY2d 418 (1967); see, also, *Matter of Herman v. Blum,* 54 NY2d 677 (1981) and *Matter of Hopkins v. Blum,* 58 NY2d 1011 (1983). It was beyond the State courts' scope of review. *Matter of Mead v. Levitt,* 74 NY2d 634 (1989).

Likewise, petitioners substantive due process argument was not preserved for review. That argument is rooted in petitioners' claim that there is not substantial evidence in the record to support the assessment of sales tax with respect to the 105 individuals who did not cooperate. Petition, pp 14-15. Essentially, this constitutional claim is concerned with the auditors reliance on outside sources rather than on petitioners' records (App 3a-4a). Since petitioners did not raise that issue at the hearing, the administrative agency did not have an opportunity to address it and it also was beyond the scope of review of the Appellate Division and the Court of Appeals.

II.

In any event, petitioners' constitutional claims have no merit.

Petitioners alleged in this proceeding that the decision of the State Tax Commission was contrary to law and arbitrary because it was not based upon their available records and that it was unsupported by substantial evidence. The State Appellate Division had a reasonable basis to reject these allegations because the State Tax

Commission could, under State law, estimate additional taxes here in that "the only evidence in the record is that petitioners' records were incomplete and inaccurate" (App 4a). Since petitioners failed to show that the audit method or tax was erroneous (App 5a), the Appellate Division properly upheld the State Tax Commission's determination. This was a reasonable decision which the Court of Appeals declined to review. 74 NY2d 610.

Petitioners' due process claims are nothing more than a belated attempt to reformulate their unsuccessful State law claims into constitutional claims. However the record shows that petitioners' due process claims are no more compelling than their State law claims. Both rely on the same unsupported allegations of procedural and evidentiary insufficiency.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
June 26, 1990

Respectfully submitted,

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Principal Attorney

of Counsel

Verified Petition, October 9, 1987

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY.

In the Matter

of

The Application of the ESTATE OF JAMES MANNO and DOMINICK MANNO d/b/a Astorian Manor,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law & Rules Vacating, Setting Aside and Annulling an Assessment of Sales and Use Taxes Together with Penalties and Interest Accruing on Said Assessment

against

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondent.

THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petition of the ESTATE OF JAMES MANNO and DOMINICK MANNO d/b/a ASTORIAN MANOR respectfully shows:

1. That RODERICK CUH, FRANCIS R. KOENIG and MARK FRIEDLANDER constitute the STATE TAX COMMISSION of the STATE OF NEW YORK.

2. That at all times hereinafter mentioned, JAMES MANNO operated a catering hall located at 25-18 Astoria Boulevard, Astoria, New York, doing business as the ASTORIAN MANOR.

3. That for the period from March 1, 1980 through February 28, 1981, the ASTORIAN MANOR was operated as a partnership wherein the late JAMES MANNO and DOMINICK MANNO were partners, and for the period from March 1, 1981 through November 30, 1983 the ASTORIAN MANOR was operated by the late JAMES MANNO as the sole proprietorship.

4. The ESTATE OF JAMES MANNO is liable for the payment of any taxes assessed against the late JAMES MANNO, together with any interest and/or penalties accruing thereon and, hence, has standing to initiate this proceeding.

5. On or about the Summer of 1983 an audit of the sales and use taxes paid by the ASTORIAN MANOR for the period from March 1, 1980 through November 30, 1983 was conducted by agents of STATE OF NEW YORK, DEPARTMENT OF TAXATION AND FINANCE.

6. At the conclusion of the aforementioned audit, an Audit Field Report dated September 18, 1984 was issued wherein it was alleged that Petitioners owed additional sales and use taxes due to the NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE in the sum of TWENTY SEVEN THOUSAND SEVEN HUNDRED NINETY and 29/100 ($27,790.29) DOLLARS for the period from March 1, 1980

through February 28, 1981 the period during which the business was operated as a partnership; and in the sum of EIGHTY THREE THOUSAND SIX HUNDRED THIRTY SEVEN and 04/100 ($83,637.04) DOLLARS for the period from March 1, 1981 through November 30, 1983, the period when the business was operated as a sole proprietorship. (A copy of the Report is annexed as Exhibit "A".)

7. On June 11, 1984, Respondent issued two separate Notices of determination and demands for payment of sales and use taxes due under Notice numbers S840611001Q and S840611000Q whereby it was alleged, respectively, that for the period from March 1, 1980-February 28, 1981 Petitioners owed the sum of TWENTY SEVEN THOUSAND SEVEN HUNDRED NINETY and 29/100 ($27,790.29) DOLLARS for sales and use taxes allegedly accrued plus penalty in the sum of SIX THOUSAND NINE HUNDRED FORTY SEVEN and 58/100 ($6,947.58) DOLLARS and interest in the sum of THIRTEEN THOUSAND NINE HUNDRED SIXTY TWO and 40/00 ($13,962.40) DOLLARS, making a total amount due of FORTY EIGHT THOUSAND SEVEN HUNDRED and 27/100 ($48,700.27) DOLLARS; and that for the period from March 1, 1981 through November 30, 1983, Petitioners owed the sum of EIGHTY THREE THOUSAND SIX HUNDRED THIRTY SEVEN and 04/100 ($83,637.04) DOLLARS for sales and use taxes allegedly due plus penalty in the sum of SEVENTEEN THOUSAND SEVEN HUNDRED FORTY SIX and 67/100 ($17,746.67) DOLLARS and interest in the sum of TWENTY THOUSAND THREE HUNDRED SIXTY NINE and 30/100 ($20,369.30) DOLLARS making a total sum due of ONE HUNDRED TWENTY ONE THOUSAND SEVEN HUNDRED FIFTY THREE and 01/100 ($121,753.01) DOLLARS purportedly representing additional sales and use taxes due from the Petitioners for the period in question together with penalties and interest as assessed by Respondent. (Copies

of the Notices of Determination and Demand For Payment of Sales & Use Taxes are annexed, collectively, as Exhibit "B".)

8. Thereafter, within 90 days from the date of the aforesaid Notices, an application was duly made by Petitioners to said Respondent to set aside said sales and use tax assessment representing allegedly unreported sales during the period aforesaid by the Petitioners.

9. Thereafter, on December 3, 1986, a hearing was held in connection with said application of Petitioners to set aside said assessment at the office of the STATE TAX COMMISSION at Two World Trade Center, New York, New York, before HON. ARTHUR JOHNSON, Hearing Officer, at which hearing certain testimony was adduced before said Hearing Officer both on the part of the Petitioners and Respondent.

10. Following said application and hearing and on or about June 11, 1987, said STATE TAX COMMISSION did deny Petitioners' application to set aside said sales and use tax assessments in whole except to the extent that the Audit Division conceded certain errors and did direct that the Audit Division modify the notices of determination and demands for the payment of sales and use taxes due issued June 11, 1984. (A copy of the said Decision is annexed as Exhibit "C".)

11. Thereafter, by Notice of Assessment Review dated July 27, 1987 Respondent issued two separate assessment notices under assessment numbers S840611001Q and S840611000Q, respectively, whereby it was alleged that for the period from March 1, 1980 through February 28, 1981 Petitioners owed additional sales and use taxes in the sum of TWENTY TWO THOUSAND TWO HUNDRED THIRTY

FOUR and 53/100 ($22,234.53) DOLLARS plus adjusted penalty and/or interest in the sum of THIRTY TWO THOUSAND EIGHT and 09/100 ($32,008.09) DOLLARS, making a total sum due of FIFTY FOUR THOUSAND TWO HUNDRED FORTY TWO and 62/100 ($54,242.62) DOLLARS; and for the period from March 1, 1981 through November 30, 1983 Petitioners owed additional sales and use taxes in the sum of SIXTY THREE THOUSAND FOUR HUNDRED TWENTY and 14/100 ($63,420.14) DOLLARS plus penalty and/or interest in the sum of SIXTY EIGHT THOUSAND THREE HUNDRED EIGHTY NINE and 58/100 ($68,389.58) DOLLARS, making a total sum due of ONE HUNDRED THIRTY ONE THOUSAND EIGHT HUNDRED NINE and 72/100 ($131,809.72) DOLLARS. (Copies of said Notices of Assessment Reviews are annexed, collectively, as Exhibit "D".)

12. Petitioners maintain that the STATE TAX COMMISSION'S assessment of sales and use tax allegedly due for the period from March 1, 1980 through August 31, 1983 was erroneous and illegal and respectfully request that this Court review the determination of the STATE TAX COMMISSION in this matter.

13. The Petitioners maintain that they are entitled to have the said sales and use tax assessments vacated and set aside and that the said determination of the STATE TAX COMMISSION denying the Petitioners' application to vacate and set aside the sales and use tax assessments is erroneous, arbitrary, capricious, lacks a rational basis and is illegal for the following reasons:

(a) field agents reviewed the appointment book which was maintained by the Petitioners and reflected the dates and times (as well as other pertinent information) for various affairs which were scheduled to be conducted at the

ASTORIAN MANOR. (See Exhibit "A", hereinafter referred to as "Report", last sentence of page 4 and page 5);

(b) 2x5 grids were prepared by the agents which, presumably, represented affairs which were scheduled to be conducted at the ASTORIAN MANOR for the tax quarters ending August 31, 1982 as those affairs were reflected in the Petitioners' appointment book. (Report, page 6);

(c) the appointment book maintained by the Petitioners was again reviewed by the agents who then placed various check marks on the 2x5 grids which they had prepared, placing an "x" in any box which correlated with a date when no affair was conducted, a "/" in any box which correlated with a date when an affair had been conducted and for which a contract had previously been filed by the Petitioners, and an "o" in any box which correlated with a date upon which an affair had been conducted and for which Petitioners had allegedly failed to submit a contract. (Report, page 6);

(d) the agents conducting the audit concluded that all grids wherever they had placed the mark "o" reflected affairs which had been conducted at the ASTORIAN MANOR for which Petitioners failed to pay sales and use taxes; however, despite the fact that the Petitioners' maintained a cash receipts book (Report, page 2) referred to as ". . . in actuality . . . a sales book . . ." (Report, pages 2 and 6), checking accounts (Report, page 3) and bank statements reflecting cash deposits (Report, page 4), all of which, in addition to Petitioners' sales tax returns (Report, page 3) were available to the agents, the report contains absolutely, no indication that the agents attempted to reconcile the affairs indicated in Petitioners' appointment, book for which they lacked contracts with the

records maintained and sales and use tax returns submitted by the Petitioners prior to concluding that the mere fact that they lacked contracts for the affairs in question reflected unreported sales;

(e) as a result of the audit procedure employed as aforesaid, the agents concluded that for the quarters ended August 31, 1982, the Petitioners failed to record ". . . *approximately* 57 affairs . . ." (Report, page 6, emphasis added);

(f) the same procedure was utilized to cover the period from September 1, 1981 through August 31, 1983 and by use of these methods the agents concluded that during the course of that period—which is co-extensive with the period referred to in subdivision (e) hereof—the Petitioners failed to record ". . . *approximately* 175 affairs . . ." (Report, page 6, emphasis added);

(g) the agents duly recorded the names, addresses and telephone numbers of the persons who gave the affairs in question and endeavored to confirm that the affairs were actually conducted (Report, page 7);

(h) the agents allegedly verified that 55 of the "approximately 175" affairs which the Petitioners had allegedly failed to record were, in fact, conducted, 25 of the aforementioned affairs were verified by contract (which the parties presumably provided to the agents and 30 were verified by statements purportedly made to the agents (Report, page 7);

(i) the information received by the agents during the course of the aforesaid field investigation "verified" the accuracy of the information contained in the Petitioners' appointment book (Report, page 7);

(j) based upon the aforementioned audit and investigative procedures employed by the agents as aforesaid, they determined that ". . . the 175 unreported affairs . . ." generated ". . . unreported income of $440,179.95 for the period from September 1, 1981 through August 31, 1983 (Report, page 7)

(k) despite the fact that no representative of the Petitioners signed a test period agreement (Report, pages 1 and 9) and despite the fact that the agents conducting the investigation clearly confirmed the accuracy of the Petitioners' appointment book (Report, page 7), the agents conducting the audit failed to examine the Petitioners' appointment book for the full audit permits and estimated additional sales and use taxes allegedly due from the Petitioners based upon a percentage of increase projected over designated tax quarters and concluded that the Petitioners generated ". . . additional taxable sales of $827,079.00 . . ." for the period from March 1, 1980 through November 30, 1983—which figure includes the allegedly unrecorded income set forth in paragraph (j) hereof;

(l) based upon the procedures and practices referred to herein, the agents conducting the audit determined that additional sales tax was due from the Petitioners in the sum of $16,638.37 for the period during which the ASTORIAN MANOR operated as a partnership—March 1, 1980 through February 28, 1981—and in the sum of $50,811.04 for the period during which the business was operated as a sole proprietorship—March 1, 1981 through November 30, 1983 (Report, page 8);

(m) Section 1138(a)(i) of the Tax Law provides, in relevant part, that if a return when filed is incorrect or insufficient, *the amount of tax due shall be determined* by the

Tax Commissioner *from such information as may be available"* (emphasis supplied);

(n) although the aforementioned section of the Tax Law also provides that "if necessary, the tax may be estimated on the basis of external indicies . . ." (emphasis supplied), it is clear from the context of the section (with the declarative "shall" juxtaposed with the permissive "may") that the confirmation of authority to utilize external indicies to project estimated tax due is predicated upon the absence of available records from which to accurately calculate the amount of tax due, if any;

(o) despite the fact that the agents who conducted the audit in question acknowledged that the Petitioners' cash receipts (or "cash sales") book (Report, pages 2 and 6), checking accounts (Report, page 3), bank statements reflecting cash deposits (Report, page 4) and appointment book (Report, page 6) were fully available to them during the course of the audit, coupled with the fact that the investigation conducted by the agents confirmed the accuracy of the information contained in the Petitioners' appointment book (Report, page 7), the agents conducting the test failed to assess (determine) the amount of tax due based upon the information which was available and opted instead to utilize external indicies to estimate the tax which they believed to be due during the audit period;

(p) the Petitioners timely objected to the assessment and specifically raised the issue of the manner in which the agents estimated the tax due despite the availability of all pertinent records at the hearing which was conducted before the STATE TAX COMMISSION on December 3, 1986 (see Exhibit "C", page 1 of the decision);

(q) despite the Petitioners' objections and the imperative of the statute in question, the STATE TAX COMMISSION arbitrarily, capriciously and illegally sustained the assessments of sales tax due;

(r) the STATE TAX COMMISSION has a duty to select a method of audit reasonably calculated to reflect sales and use taxes due and the use of external indicies is impermissible where, as in the instant case, the records available are sufficient to enable the verification of sales receipts and the conduct of a complete audit;

(s) there was no basis in law or fact or in the evidence adduced before the STATE TAX COMMISSION upon which the COMMISSION may rest, and the determination of the COMMISSION is contrary to the law and arbitrary on the facts.

14. Notice of Application to review the aforesaid determination of the STATE TAX COMMISSION is given and this proceeding is instituted within four months after the mailing to Petitioners of notice of said determination.

15. The original of the applications, returns and determinations herein referred to, and the minutes of the testimony presented and the evidence at the hearing held by the COMMISSION as aforesaid are in the possession of the STATE TAX COMMISSION so that the same may be returned to this Court by such COMMISSION; and the same may be made part hereof as if at length set forth herein.

16. Petitioners have paid to the STATE TAX COMMISSION the full amount of the said assessment with interest and penalty charges thereon, as determined in the determination of said COMMISSION as being payable by the Petitioners, under protest, and will duly procure and file

with the COMMISSION just prior to making this application an undertaking, as required by the Tax Law of State of New York, for the costs and charges which may accrue against them in the prosecution of this proceeding including the costs of appeals.

17. No application for this or similar relief has been made to any other Court or Judge.

WHEREFORE, your Petitioners respectfully request that this Court review the determination of the TAX COMMISSION in the matter of the application of the Petitioners to vacate and set aside said sales and use tax assessments, #S840611001Q for the period from March 1, 1980 through February 28, 1981 and sales and use tax assessment #S840611000Q for the period from March 1, 1981 through November 30, 1983, being the determinations rendered June 18, 1987, and that the Court reverse and annul the determination of the COMMISSION in the matter, and in this connection direct that the COMMISSION shall vacate, set aside and annul said sales and use tax assessment against Petitioners for the said period and directing a refund to Petitioners of the sum of $190,438.97 said sales and use taxes determined to be payable in the said determination and which has been paid under protest by the Petitioners, and that the Petitioners have such other and further relief as may be just and proper, together with the costs of this proceeding.

Dated: Brooklyn, New York
October 9, 1987

ESTATE OF JAMES MANNO

By: Carl N. Mione—Attorney for
Estate of JAMES MANNO

Exhibit 1 of the Return, December 3, 1986.

Safran-Direct

(16) Hearing Officer: Off the record.

(Whereupon, a discussion was held off the record.)

Mr. Palmer: I would offer Exhibit J into evidence.

Mr. Richard: You want to make the letters as part of that exhibit also?

Mr. Palmer: I'd like to have these marked for identification. Give them to Mr. Safran, he can tell us what they are.

Mr. Richard: Mark them as the same.

Hearing Officer: We're also marking for identification two folders of letters which will be part of Exhibit J for identification.

Q. I show you the two file folders containing documents which have been marked as State's Exhibit J and ask you what they are? A. These are replies from the parties contacted.

Q. And of these replies, which were summarized in the other exhibit J? A. Yes, that's correct. I would like to explain how we arrived at these 175 additional affairs. The appointment book that is utilized—

Q. Let me interrupt you so that we can get this (17) into evidence.

Mr. Richard: They are marked.

Mr. Palmer: I will have them marked into evidence.

Mr. Richard: Put them in evidence.

Hearing Officer: Back on the record.

(Exhibit J for identification now received in evidence, as of this date.)

Hearing Officer: You want these back?

Q. Okay, maybe you can tell us a little bit about what the relationship between Exhibit J, the summary and Exhibit J, the letters in the files are and what you did to obtain them and how these were prepared and how they came to be received by you? A. The appointment book since Astorian Manor is a rather large caterer, they have ten rooms that are available for use for affairs, for Friday nights, Saturdays and Sundays a.m. and p.m. In the appointment book there was a two by five grid which listed, it was two columns, five rows listing each room and what affair was booked. The appointment book was used by the various banquet managers when they booked an affair.

Q. Mr. Safran, do you have anything to illustrate what that appointment book looked like?